1997

State of Utah v. John D. Hawkins : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 970398-CA
v.	:	
JOHN D. HAWKINS,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR BURGLARY, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE HOMER F. WILKINSON PRESIDING

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction for burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1995), in the Third Judicial District Court, Salt Lake County, the Honorable Homer F. Wilkinson presiding.[1] This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1997).

ISSUES PRESENTED ON APPEAL and STANDARDS OF REVIEW

1. Could reasonable minds conclude that neither an abandoned "lease" nor demands that defendant remove his property from the leased shop authorized defendant to kick in the door and enter the premises at 4 a.m.?

"In a jury trial in a criminal proceeding, [this Court will] review the evidence and all inferences which may reasonably be drawn

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[1] Defendant was also convicted of theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1995) (R. 130-31, 167-68).

therefrom in the light most favorable to the jury verdict." State v. Ortiz, 782 P.2d 959, 962 (Utah App. 1989) (citation omitted), cert. denied,795 P.2d 1138 (Utah 1990). It will "reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." Id.

2. Could reasonable minds infer defendant's intent to commit theft from record facts, including that he entered the premises at 4 a.m., removed others' property, and lied about it to police?

See standard of review for issue no. 1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This case involves the following statutes, which are reproduced in addendum A:

Utah Code Ann. § 76-6-201(3) (1995);
Utah Code Ann. § 76-6-202 (1995).

STATEMENT OF THE CASE

Defendant was charged by Amended Information as follows:

Count I **Burglary**, a third degree felony, in violation of Utah Code Ann. § 76-6-202;

Count II **Theft**, a third degree felony, in violation of Utah Code Ann. § 76-6-404.

(R. 120-21). At the conclusion of a two-day trial, the jury found defendant guilty of burglary and class A misdemeanor theft, a lesser included offense of count II of the Information (R. 130-31, 167-68).

Defendant was sentenced to statutory terms and fines, but his sentences were stayed and defendant was placed on 36-month probation (R. 196-97). Defendant timely appealed (R. 293).

STATEMENT OF FACTS[2]

The Markhams' two units

Gloria Markham and her brother, Tim Markham, rented two 30 X 30 shop units, no. 98 and no. 99, in a light industrial complex of 100 such units in Murray City (R. 300: 64, 195).[3] Each unit had an roll-up, overhead door and an "outside door" (R. 300: 101). Units 98 and 99 were connected by an interior door (R. 300: 148).

Defendant's sublease: "You pay, you stay"

In the summer of 1995, Tim Markham let defendant, who was the Markhams' first cousin once removed (see R. 300: 63, 134), do some auto body work and "fiddling around" in the units (R. 300: 136-37, 208). Defendant used the units from time to time thereafter; he sometimes spent the night there (R. 300: 138; R. 301: 34). Tim Markham, also in the auto body business, let defendant use his tools (R. 300: 65, 171). Defendant had no tools that were of any use to Markham (R. 300: 172).

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[2] Except as noted, facts are stated in the light most favorable to the jury's verdict. State v. Dunn, 850 P.2d 1201, 1205-06 (Utah 1993); State v. Verde, 770 P.2d 116, 117 (Utah 1989).

[3] "R. 300: 64" refers to page 64 of the transcript that is labeled "R. 300."

Tim Markham subleased unit 98 to defendant (R. 300: 67, 140); his arrangement with subtenants, including defendant, was month-to-month: "you pay and you stay. If you don't, you go" (R. 300: 136, 169; R. 301: 198). Generally, defendant's property was in unit 98, Tim Markham's in unit 99 (R. 300: 92, 140).

Defendant was supposed to pay $340 per month, which was the rental Tim Markham was paying on each unit (R. 300: 169). Defendant made a couple of payments, including one to the unit manager in November 1995 (R. 300: 69, 170, 199; Defendant's exhibit 14).[4]

Because some rollers were missing from the overhead door of unit 98, Tim Markham used vise grips to lock the door from the inside (R. 300: 72, 147-48; R. 301: 199). If defendant came to use the unit and forgot his key, he would sometimes roll under this door (R. 300: 138).

Defendant "evicted himself by not showing"

However, after October 1995 defendant "just disappeared for two or three months and never came back for anything" (R. 300: 108, 158, 170, 205; R. 301: 10). At this time, defendant went to work as a handyman, security person, and bartending intern at the Three-Alarm Saloon, owned by Jack Carlton (R. 301: 87-88, 110).

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[4] Apparently, defendant's employer and partner, Jack Carlton, furnished the rent money so that defendant could complete work on Carlton's wife's car and do other jobs (R. 301: 82-83).

Defendant paid no rent for the months of December 1995 or January 1996 (R. 300: 158, 199-20; R. 301: 108, 198). The Markhams never formally evicted him; according to Tim Markham, "he evicted himself by not showing" (R. 300: 170). "[B]ecause [defendant] was gone," Tim Markham changed the locks (R. 300: 139, 171).[5] This was in keeping with his policy of "[n]o pay, no stay" (R. 300: 171).

Defendant did not enter the units after the end of October until the night of the crime, 14 January 1996 (R. 300: 149, R. 301: 52-53).

During this period, the Markhams, Jim Severns, and the manager of the units called defendant and his employer/partner Jack Carlton "all the time to tell them to come and get their stuff, [but] they never did" (R. 300: 108-09, 141-42; R. 301: 19-20). In fact, defendant "was called three or four or ten or twenty times" (R. 300: 141). Tim Markham told him to "Come and get your stuff," except that he did not use the word "stuff" (R. 300: 142).

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[5] Tim Markham was unable to change one lock. Jim Severns had given defendant a padlock, which he apparently placed on the outside door of unit 98 (R. 300: 139-40; R. 301: 163-64). Severns kept the other key (R. 301: 164). Despite this fact, Tim Markham was of the belief that "there was no way [defendant] could get in" (R. 300: 139), perhaps because of the "motorcycle laying in front of the door" (R. 301: 170).

Defendant's statement that "the state objected when Mr. Hawkins, while testifying, produced the key to access the units," Br. Aplt. at 21, is incomplete. The State objected on the ground that "without the padlock itself . . . [i]t doesn't mean anything" (R. 301: 169). The court sustained the objection (id.). Defense counsel neither contested the State's objection nor attempted to establish that the key defendant drew out of his pocket fit the padlock.

Tim Markham subleases unit 98 to a new subtenant

After defendant abandoned unit 98, Markham rented it to a replacement subtenant (R. 300: 144, 184). His arrangement with this new subtenant, as with defendant, was "You pay, you stay; you don't, you go" (R. 300: 144).

Jim Severns sees defendant at the shop around 4 a.m.

Jim Severns was staying in his unit, no. 84, on the night of Saturday, 13 January 1996 (R. 301: 8, 11). Hearing two cars, he walked out of his unit and saw two cars parked near the end of the row; the drivers were talking to each other (R. 301: 11). One car drove off, but the other pulled up and stopped at Severns' shop; it was defendant (R. 301: 11).

Severns was shocked to see defendant because he had not seen defendant around the units for a long time (R. 301: 12, 42). Defendant "seemed nervous" and asked Severns what he was doing there (R. 301: 12, 52). This question also struck Severns as unusual, since defendant knew that Severns was typically present at the units (R. 301: 12, 52).

When asked the same question in return, defendant said he was looking for his dog (R. 301: 12). His Dalmatian then came running up and got into defendant's car, and defendant left (R. 301: 12-13). On his way out, defendant stopped and talked to the driver of the other car again, after which both cars left (R. 301: 22).

At about 4:12 a.m., defendant called Severns from a pay phone (R. 301: 13-14). He said that he had driven by Severns' shop and that the door was open and a station wagon was parked out front (R. 301: 14). A few minutes later defendant called again (R. 301: 14). He wanted Severns to "go down and get all of his tools and everything he had down there the next day" (R. 301: 14). Severns told him to come down the next day and he would help him get them (R. 301: 14).[6]

Severns woke up at about 6:30 a.m. and walked down the row of units (R. 301: 15). Noticing the bottom of unit 98's door was kicked in, Severns looked around the unit, then went to Tim Markham's house and got Tim, who in turn called Gloria (R. 301: 15-16).

"I went in and did what I had to do"

Inspection of unit 98 revealed that the vise grips had been popped off and the bottom of the door damaged, having been bent or "kicked in" (R. 300: 72, 145, 148).

Defendant had taken various items, including a welder, a spray gun, paint guns, and a microwave (R. 300: 73). In fact, except for his dragster and a compressor that was too heavy to carry, all of defendant's things were gone, along with Markham's tools (R. 300: 128-29, 146-50, 184; R. 301: 17, 40-41; State's exhibits 3, 4). Defendant loaded a garbage can with the new subtenant's power tools,

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[6] The day before and earlier that night defendant had called police, claiming a dispute with his "partner" over tools in Markham's units; they advised him the matter was a civil dispute (Defendant's exhibit 15 & 16).

but the bottom fell out of it before he could remove it from the unit (R. 300: 73, 151; R. 301: 16-17). The stolen tools were basically what one would need to be in the auto-body business (R. 300: 152).

Defendant left some valuable items--including a VCR, a television, a Telecaster guitar and two guitar amplifiers--but took other things that had value only to him, such as dragster brakes and glass cabinet doors (R. 300: 124-26, 157).

Defendant admitted at trial that he entered both units on the night of 13-14 January 1996 and "did what I had to do" (R. 301: 169-71, 198).[7] At that time, defendant did not have the permission of either Gloria or Tim Markham to be in unit 98 or 99 or to remove any tools (R. 300: 117, 149, 158).

"It was pretty obvious who was there"

Because it was "pretty obvious" who had entered the units, Tim Markham called defendant at about 8:00 a.m. on the morning of 14 January 1996 (R. 300: 159). Markham said, "Hawk, this is me . . . Just bring the tools back and come and get your shit" (R. 300: 159).[8] Defendant responded, "I'm not awake yet, man; call me later"

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[7] Defendant never admitted taking the property. When asked on direct, "[D]id you take anything with you when you exited?" defendant evaded: "Just -- I was looking for my dog. That's it" (R. 301: 172).

[8] By "shit," Tim Markham was referring to Jack Carlton's trucks, two Hondas, a dragster trailer, and "all the junk that [defendant] left sitting in front of the shop" (R. 300: 185).

(R. 300: 159). When Markham called a second time, defendant stated, "It wasn't me, man. I didn't do it" (R. 300: 160).

Gloria Markham called defendant's employer and partner, Jack Carlton, about the stolen tools (R. 300: 73-74). Carlton stated, "Yes, we know about this, and we might know where they are, and there was a family member that had hocked them" (R. 300: 78, 97). When she said, "Well, John's a family cousin. What are you telling me?" He responded, "I don't know. I'm going to have to check things out" (R. 300: 98).

After continued wrangling with defendant, Carlton, and their lawyer left her feeling that "[n]obody wants to work things out," Gloria Markham called the police (R. 300: 74, 77, 93).[9]

Defendant lies to police

In the course of investing this crime, Detective Deven Higgins called defendant and told him that Tim and Gloria Markham were accusing him of the crime; defendant denied any involvement (R. 300:

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[9] Gloria Markham wrote Carlton and defendant letters in a continuing attempt to get them to remove their vehicles from the units (R. 300: 74, 78; Defendant's exhibit 6; State's exhibit 8). Eventually defendant's lawyer called her about the cars (R. 300: 74-75). She told him, "We just want them out of there. We want our stuff back and want their stuff out of here" (R. 300: 75). Carlton offered to pay Gloria about a third of the storage fees she was claiming; she rejected this offer because she "wanted the tools back" (R. 300: 77). Defendant and Carlton then sued her (R. 300: 77). A week and a half later, the dragster was stolen out of unit 98 (R. 300: 84,86; see also 230-31). Carlton's other cars were eventually towed away (R. 300: 165, 215).

218-19, 221). Detective Higgins then told defendant that a witness (Jim Severns) had seen him at the units on the night in question; defendant "denied he was seen" by Severns, claiming, "They're all liars, and that wasn't me" (R. 300: 222; State's exhibit 19 second page 1; see also R. 301: 206, 209-10).

Defendant later admitted to Detective Higgins that he did go into the unit, but claimed that he did not take anything (R. 300: 222, State's exhibit 19 [last page]). At trial he admitted talking to Severns there that night (R. 301: 196).

SUMMARY OF ARGUMENT

1. **"License and privilege" to enter.** Although defendant challenges the sufficiency of the evidence, he fails to marshal the facts supporting the jury's verdict as required by settled appellate principles. His claim is therefore not properly before this Court.

In any event, reasonable jurors could have concluded at trial that defendant's "lease" did not grant him "license and privilege" to break into units 98 and 99 at 4 a.m. and remove his and others' property. It was a month-to-month, oral lease whose one term was, "you pay and you stay. If you don't, you go" (R. 300: 136, 169; R. 301: 198). Defendant did not pay, and does not claim to have paid, for the months of December 1995 or January 1996. Accordingly, he had no right to enter the units in January 1996.

Likewise, reasonable jurors could have concluded at trial that the Markhams' demands that defendant retrieve his and Jack Carlton's

vehicles did not authorize him to break into units 98 and 99 at 4 a.m. and remove his and others' property. Based on the evidence, jurors could reasonably believe that the Markhams intended and were understood to have intended for defendant to come during business hours and remove his property under their supervision.

2. **Intent to commit theft.** In challenging the jury's finding of criminal intent, defendant again fails to marshal the supporting facts.

However, reasonable jurors could infer defendant's criminal intent from the facts, including the following: defendant admitted entering the shops on the night in question; defendant entered the shops at approximately 4 a.m. by kicking in the door; defendant removed property owned by Tim Markham as well as his own; and when confronted by police, defendant lied about entering the shops.

ARGUMENT

Introduction

Defendant's claims on appeal challenge the sufficiency of the evidence at trial and are therefore controlled by the following general principles.

Sufficiency challenges. "In challenging the sufficiency of the evidence, defendant carries a heavy burden." State v. Pilling, 875 P.2d 604, 607 (Utah App. 1994). This Court will reverse a jury verdict for insufficient evidence only when the evidence is "sufficiently inconclusive or inherently improbable that reasonable

minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Ortiz, 782 P.2d 959, 962 (Utah App. 1989) (citation omitted), cert. denied, 795 P.2d 1138 (Utah 1990).

In making this determination, this Court will "review the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the jury verdict." Id.

Defendant's burden to marshal. Consequently, a defendant must "marshal all evidence supporting the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict." Pilling, 875 P.2d at 607-08 (quoting State v. Scheel, 823 P.2d 470, 472 (Utah App. 1991) (in turn quoting State v. Perdue, 813 P.2d 1201, 1207 (Utah App. 1991))).

"The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position." West Valley City v. Majestic Investment Co., 818 P.2d 1311, 1315 (Utah App. 1991). He or she must then present, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence." Id.

A defendant does not satisfy "this heavy burden," id., if he "only cites the evidence favorable to his claims and reargues the evidence as if at trial." Brown v. Richards, 840 P.2d 143, 149 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993). "Such an approach is inappropriate on appeal." Id.

Where an appellant fails to satisfy the marshaling requirement, it is inappropriate for an appellate court to entertain the merits of the challenge. Pilling, 875 P.2d at 608.

POINT I

REASONABLE MINDS COULD CONCLUDE THAT NEITHER AN ABANDONED MONTH-TO-MONTH "LEASE" NOR THE MARKHAMS' DEMANDS THAT DEFENDANT REMOVE HIS PROPERTY FROM THEIR PREMISES AUTHORIZED DEFENDANT TO KICK IN THE DOOR AND ENTER THE SHOPS AT 4 A.M.

Defendant claims that his sublease with Tim Markham "vested in him the lawful right to enter unit 99." Br. Aplt. at 18. He further claims that Markham ratified defendant's "repeated, open and notorious entries into the unit." Id. at 19. Because his entry was authorized, he argues, the jury could not have convicted him of burglary. Id. at 13-14.

"A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person." Utah Code Ann. § 76-6-202(1) (1995).

"A person 'enters or remains unlawfully' in or upon premises when the premises or any portion thereof at the time of the entry

or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof." Utah Code Ann. § 76-6-201(3) (1995).

Consequently, defendant may prevail here only if the evidence is so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" that he was "licensed or privileged to enter" units 98 and 99 on 14 January 1996. Ortiz, 782 P.2d at 962 (citation omitted).

A. Defendant's failure to acknowledge or satisfy his "heavy burden" to marshal the evidence defeats this claim.

Despite claiming to summarize the evidence on which "the jury found Mr. Hawkins guilty of burglary," Br. Aplt. at 12, defendant's brief minimizes or ignores evidence supporting the jury's conclusion that defendant's 4 a.m. entry was unauthorized, including the following facts:

- defendant's arrangement with Tim Markham was month-to-month and defendant paid no rent for December 1995 or January 1996 (R. 300: 158, 198-200; R. 301: 198);
- after October 1995 defendant "just disappeared for two or three months and never came back for anything" (R. 300: 108, 139, 158, 170, 205; R. 301: 10);
- according to Tim Markham, defendant "evicted himself by not showing" (R. 300: 170);
- "because [defendant] was gone," and in keeping with his policy of "[n]o pay, no stay," Tim Markham changed his locks on the units (R. 300: 139, 171; cf. R. 300: 139-40);
- after defendant left, Tim Markham leased unit 98 to a third party (R. 300: 144, 184);

- Jim Severns was shocked to see defendant in the early morning hours of 14 January 1996 because he had not seen him around the units for a long time (R. 301: 12, 42);

- at that time, defendant asked Severns what he was doing there, a question that Severns found unusual (R. 301: 12, 42, 52).

- defendant admitted at trial that he entered both units on the night of 13-14 January 1996 and "did what I had to do" (R. 301: 169-71, 198);

- when Gloria Markham called defendant's partner seeking a return of the tools defendant stole, he stated, "Yes, we know about this, and we might know where they are, and there was a family member that had hocked them" (R. 300: 78, 97).

- defendant lied to the investigating officer, denying the encounter with Severns and claiming, "They're all liars, and that wasn't me" (R. 300: 222; State's exhibit 19 second page 1; see also R. 301: 206, 209-10).

Because defendant has failed to fulfil or even acknowledge his obligation to marshal the evidence in support of the jury's verdict, this Court should decline to reach the merits of this claim. See Pilling, 875 P.2d at 608.

B. In any event, the record refutes defendant's claim that he was authorized to break into the units.

Defendant's claim fails on the merits in any event.

Abandoned lease. Contrary to defendant's assertions on appeal, Br. Aplt. at 18-22, no lease entitled him to enter the premises on 14 January 1996.

Defendant acknowledges that Tim Markham's agreement with him was "you pay, you stay. If you don't you go." Br. Aplt. at 5 (citing R. 300: 136, 169). And he admitted at trial that he paid no rent

for December 1995 or January 1996 (R. 300: 158, 198-200). Consequently, as defendant understood would be the case, Tim Markham changed the locks and rented the space to a paying tenant (R. 300: 139, 144, 171, 184).

This conclusion is strengthened by the fact that, when confronted by police after the break-in, defendant did not claim that his entry was authorized by Tim Markham's oral, month-to-month lease; instead he lied and denied he was even present that night (R. 300: 222; State's exhibit 19 second page 1; see also R. 301: 206, 209-10).

Finally, although defendant testified at trial, he never claimed to have entered the premises pursuant to a lease (see R. 301: 168-76).

From these facts, among others, reasonable jurors could have concluded that, whatever license defendant and the Markhams understood him to hold prior to January 1996, by that date he had no leasehold right to enter the premises.

The Markhams' "open invitation." Similarly, defendant's claim on appeal that he was granted an unrestricted "open invitation" to enter the units, see Br. Aplt. at 24, puts too wishful a spin on the facts. Defendant stopped using the space and stopped paying for it, but left his property on the premises; accordingly, Tim Markham changed the locks, re-rented the space, and, along with Gloria and Jim Severns, demanded that defendant remove his property (R. 300: 108-09, 139, 158, 171; 198-200, 205; R. 301: 10, 19-20).

Jurors could reasonably conclude that when someone says, "Come and get your shit" (R. 300: 142, 159), he is not granting "full access to the building at all hours," as defendant now claims. Br. Aplt. at 20. Jurors could also reasonably conclude that the Markhams intended and were understood to have intended for defendant to come during business hours and remove his property under their supervision. And while defendant is technically correct that the record does not establish that the Markhams ever "told Mr. Hawkins he was no longer welcome" or formally "evicted" him, Br. Aplt. at 9, there can be no doubt, based on the trial record, that everyone understood that this was the case.

Moreover, defendant never, even in his trial testimony, claimed that his break-in was authorized by any "open invitation" (R. 300: 222; State's exhibit 19 second page 1; R. 301: 168-76; see also R. 301: 206, 209-10).

On appeal, defendant relies in part on his allegation, without citation to the record, that "[t]he Markhams had given Mr. Hawkins a key to the side door." Br. Aplt. at 7. However, the record indicates that Jim Severns, not the Markhams, gave defendant a padlock, which defendant apparently placed on the outside door of unit 98 (R. 300: 139-40; R. 301: 163-64). Severns kept the other key (R. 301: 164). Jurors could reasonably conclude that keeping the key to a lock you hung on the side door to your old place does not entitle you to re-enter the premises in the middle of the night.

In any event, by 14 January 1996 defendant had apparently lost or forgotten his key, because he entered unit 98 by kicking in the door (see R. 301: 15).

Defendant's claim that Tim Markham ratified his "open and notorious entry into unit 99," Br. Aplt. at 22, is equally unsupportable. No testimony established that defendant entered the premises after October 1995 with the Markhams' knowledge. On the contrary, Jim Severns and Tim Markham both testified that defendant had not been in the units after the end of October until the night of the crime (see R. 300: 139, 149, R. 301: 52-53).

Unlawful remaining. Finally, defendant asserts, "If there is no unlawful entry, the State must show an unlawful remaining in order to sustain a burglary charge." Br. Aplt. at 24. The State agrees. However, since the State established at trial that defendant entered the premises unlawfully, it had no duty or reason to prove that defendant also remained on the premises unlawfully. See Utah Code Ann. § 76-6-202 (1995). Accordingly, the State will not respond to defendant's appellate discussion of unlawful remaining. See Br. Aplt. at 24-29.

POINT II

REASONABLE MINDS COULD INFER DEFENDANT'S CRIMINAL INTENT FROM THE FACT THAT HE ENTERED THE PREMISES AT 4 A.M., REMOVED PROPERTY NOT BELONGING TO HIM, AND LIED TO POLICE

Defendant claims that "the State failed to offer sufficient evidence to show Mr. Hawkins possessed the criminal intent necessary

to support a burglary conviction." Br. Aplt. at 29 (boldface and capitalization removed).

A. Defendant's failure to acknowledge or satisfy his "heavy burden" to marshal the evidence defeats this claim.

As with his previous claim, defendant fails to acknowledge or satisfy the marshaling requirement. Rather, he "only cites the evidence favorable to his claims and reargues the evidence as if at trial." Brown 840 P.2d at 149. See Br. Aplt. at 31-32. "Such an approach is inappropriate on appeal." Brown 840 P.2d at 149. This claim therefore fails.

B. In any event, the record refutes defendant's claim that he lacked criminal intent.

Defendant's claim fails on the merits in any event. "A person is guilty of burglary if he enters . . . a building or any portion of a building with intent to commit . . . theft . . ." Utah Code Ann. § 76-6-202(1) (1995). "Intent with which an entry is made is rarely susceptible of direct proof. It is usually inferred from circumstantial evidence: [1] the manner of entry, [2] the time of day, [3] the character and contents of the building, [4] the person's actions after entry, [5] the totality of the surrounding circumstances, and [6] the intruder's explanation." State v. Porter, 705 P.2d 1174, 1177 (Utah 1985).

Viewing evidence of the foregoing six factors in the light most favorable to the jury's verdict demonstrates that the evidence was sufficient for reasonable jurors to find criminal intent.

Manner and time of entry. Contrary to defendant's various explanations, evidence at trial indicated that defendant gained access to the units by kicking in or bending the overhead door (R. 300: 72, 145, 149; R. 301: 15).[10] Defendant admits he entered the units around 4 a.m. See Br. Aplt. at 32.

Forcible entry during nighttime supports an inference that a defendant acted "with an intent to commit theft." State v. Brooks, 631 P.2d 878, 882 (Utah 1981); accord State v. Sisneros, 631 P.2d 856, 859 (Utah 1981) ("When one breaks and enters a building in the night-time, without consent, an inference may be drawn that he did so to commit larceny").

Character and contents of the building. Stolen from the units were items belonging to defendant together with tools owned by Tim Markham and a third party (R. 300: 128-29, 146-50, 172, 184; R. 301: 17, 40-41, 51; State's exhibits 3, 4). The stolen tools were basically what one would need to be in the auto-body business (R. 300: 152). Defendant's goal was to own an auto-body shop (R. 301: 177-78). This factor supports an inference of criminal intent.

Defendant's actions after entry. After entering the units, defendant removed all of his portable property and removed or attempted to remove other tools (R. 300: 73-74, 128-29, 146-51, 184; R. 301:

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[10] At trial defendant claimed to have let himself in "[w]ith my padlock key" (R. 301: 169). His brief surmises that defendant "presumably gained access to the units by rolling under the broken roll-up garage door." Br. Aplt. at 31.

17, 40-41, 51; State's exhibits 3, 4). Obviously, that defendant committed theft after entering the building supports an inference that he entered the premises with the intent to commit theft.

Intruder's explanation. Defendant's post-crime explanations varied. He lied to police and claimed that Severns had seen someone else at the crime location on the night in question (R. 300: 222; State's exhibit 19 second page 1; see also R. 301: 206, 209-10). At trial defendant admitted that he entered both units on the night in question and "did what I had to do" (R. 301: 169-71, 198).

Inconsistent or false explanations are incriminating. See State v. Smith, 726 P.2d 1232, 1235 (Utah 1986); State v. Gellatly, 449 P.2d 993, 995 n.2 (Utah 1969).

Totality of surrounding circumstances. In addition to the facts cited above, the following facts are among those that tend to incriminate defendant: he was acting nervous and unusual when Severns confronted him at the scene of the crime; defendant's partner stated afterwards that "we might know where [the missing tools] are"; and valuable items for which defendant had no use were not taken in the burglary. See pp. 6-9 herein.

The trial evidence, viewed in the light most favorable to the jury's verdict, contains abundant evidence of defendant's intent to commit theft.

CONCLUSION

Defendant's burglary conviction should be affirmed.[11]

RESPECTFULLY submitted on 13 February 1998.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first-class mail this 13 February 1998 to the following:

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[11] Defendant does not challenge his conviction for theft. See Br. Aplt. at 34.

Addendum A

UTAH CODE ANNOTATED

76-6-201. Definitions.

For the purposes of this part:

(1) "Building," in addition to its ordinary meaning, means any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein and includes:

(a) each separately secured or occupied portion of the structure or vehicle; and

(b) each structure appurtenant to or connected with the structure or vehicle.

(2) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

(3) A person "enters or remains unlawfully" in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof.

(4) "Enter" means:

(a) intrusion of any part of the body; or

(b) intrusion of any physical object under control of the actor.

76-6-202. Burglary.

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.